(3)

No. 95-422

Supreme Court, U.S.
FILED
NOV 17 1995
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

EDWIN R. O'NEILL, FRANCIS A. ORFF,
Y. STEPHEN PILIBOS,
Petitioners,

v.

UNITED STATES OF AMERICA, DEPARTMENT OF THE INTERIOR, BUREAU OF RECLAMATION,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITIONERS' REPLY BRIEF

Of Counsel:
HAL S. SCOTT
Harvard Law School
1557 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4590

WILLIAM M. SMILAND
Counsel of Record
SMILAND & KHACHIGIAN
Seventh Floor
601 West Fifth Street
Los Angeles, CA 90071
(213) 891-1010
Attorneys for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
INTRODUCTION	1
I. THE GOVERNMENT'S FAILURE TO DEFEND THE IMPROPER DECISION OF THE DISTRICT COURT ON THE CONSTITUTIONAL ISSUES SHOULD BE TREATED AS A CONFESSION OF ERROR, AND THE COURT OF APPEALS OPINION SHOULD BE VACATED	2
A. The Government Effectively Concedes By Its Silence That The District Court's Opinion Was Erroneous And Merits Review	2
B. The Government's Concession By Silence Warrants Summary Disposition In Favor Of Petitioners	4
II. NEW POINTS RAISED IN THE OPPOSITION BRIEF RELATING TO THE COURT'S ABSTENTION ON THE STATUTORY ELEMENTS OF THE DEFENSE ARE WITHOUT MERIT	5
CONCLUSION	8

TABLE OF AUTHORITIES

Cases Page

Board of Regents v. Roth, 408 U.S. 564 (1972) 6
Bowen v. Public Agencies Opposed to Social Security Entrapment, 477 U.S. 41 (1986) 2
Burger v. Zant, 467 U.S. 1212 (1983) 5
Califano v. Yamasaki, 442 U.S. 682 (1979) 3
Casey v. U.S. 343 U.S. 808 (1952) 4
Cates v. Haderlein, 342 U.S. 804 (1951) 5
Delta Airlines, Inc. v. August, 450 U.S. 346 (1981) 6
Edward J. DeBartolo Corp. v. NLRB, 463 U.S. 147 (1983) 3
Gardebring v. Jenkins, 485 U.S. 415 (1988) 4
Iron Arrow Honor Society v. Heckler, 464 U.S. 67 (1983) 5
Missouri v. Jenkins, 495 U.S. 33 (1990) 6
Ohio v. Roberts, 448 U.S. 56 (1980) 3
Powell v. Texas, 492 U.S. 680 (1989) 3
Sacher v. U.S., 343 U.S. 1 (1951) 6
Schiro v. Farley, —— U.S. ——, 114 S. Ct. 783 (1994) 4
Taylor v. Illinois, 484 U.S. 400 (1988) 6
U.S. v. Mendenhall, 446 U.S. 544 (1980) 6
U.S. v. Montalvo-Murillo, 495 U.S. 711 (1990) 7
Youakim v. Miller, 425 U.S. 231 (1976) 6

Miscellaneous

R. Stern, E. Gressman, S. Shapiro, K. Geller, *Supreme Court Practice* (7th ed. 1993) 4, 5, 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-422

EDWIN R. O'NEILL, FRANCIS A. ORFF,
Y. STEPHEN PILIBOS,
Petitioners,

v.

UNITED STATES OF AMERICA, DEPARTMENT OF THE INTERIOR, BUREAU OF RECLAMATION,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITIONERS' REPLY BRIEF

INTRODUCTION

Petitioners presented as a main reason for granting certiorari that the District Court, as affirmed by the Court of Appeals, rendered improper advisory opinions on unripe elements of the government's defense, in particular, the issue of Congressional power under the due process clause to deprive farmers of perfected water rights against the Bureau of Reclamation. Pet. at 19-22. The government's brief in opposition offers no defense of the District

Court's action; indeed, it entirely fails to address petitioners' argument. The Court should treat this deafening silence as a confession of error by the government. Accordingly, it should summarily dispose of this case by granting certiorari, holding that the District Court rendered a premature and unnecessary decision, vacating the opinion of the Court of Appeals, and remanding the case to that court for further proceedings not inconsistent with this Court's judgment. At the very least, this Court should ask the government to deal with petitioners' argument.

This reply brief also addresses new points raised by the government's brief in opposition relating to the abstention by the District Court, also affirmed by the Court of Appeals, on the statutory aspects of the government's defense.

I. THE GOVERNMENT'S FAILURE TO DEFEND THE IMPROPER DECISION OF THE DISTRICT COURT ON THE CONSTITUTIONAL ISSUES SHOULD BE TREATED AS A CONFESSION OF ERROR, AND THE COURT OF APPEALS OPINION SHOULD BE VACATED.

A. The Government Effectively Concedes By Its Silence That The District Court's Opinion Was Erroneous And Merits Review.

The District Court decided, assuming *arguendo* that the government was obligated to supply, without excuse, the water in question, that the government's involuntary reallocations of the water were constitutional under the reserved sovereign power of Congress, citing *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 53 (1986). App. B at 46a-48a. The Court of Appeals affirmed, citing the same case, and stated as follows: "Even if the water service contract did obligate the government to supply, without exception, 900,000 acre-feet of water, the district court correctly held that Area I would still not be entitled to prevail as the contract

is not immune from subsequently enacted statutes." App. A at 16a-17a. About this most far-reaching aspect of the decision below, the government's brief says nothing. But its silence cannot hide the fact that the court below has ruled that Congress, at its will, can constitutionally direct the Bureau to deprive participants in the reclamation program of valuable water rights perfected by many years of beneficial use.[1] This ruling was purely advisory since the issue of the government's legislative power to relieve itself of its own water sale obligations would only have been ripe for adjudication if the District Court had simultaneously decided, rather than abstained from deciding, that the Bureau was justified by statutory mandates.

The government's brief declines to oppose a key reason stated in the petition for granting the writ—that the decision conflicts with this Court's rules on ripeness and advisory opinions. Pet. at 19-22. Petitioners relied on, among other authorities, *Califano v. Yamasaki*, 442 U.S. 682, 692 (1979) ("A court presented with both statutory and constitutional grounds to support the relief requested usually should pass on the statutory claim before considering the constitutional question. . . .") and *Edward J. DeBartolo Corp. v. NLRB*, 463 U.S. 147, 158 (1983) ("Until the statutory question is decided, review of the constitutional issue is premature."). The government's brief does not refer to either the ripeness or the advisory opinion doctrine, does not discuss *Califano*, *DeBartolo*, or any of the other cases petitioners cited, and does not attempt to deal in any fashion with this central reason for granting the writ.

The government also ignores a second and related reason for granting the writ. Petitioners showed that the

---

[1] The wording of the District Court opinion (which was given preclusive effect in the subsequent related suit) and of the Court of Appeals opinion indicates that the constitutional ruling is an alternative holding. See *Powell v. Texas*, 492 U.S. 680, 682 (1989); *Ohio v. Roberts*, 448 U.S. 56, 70 n.10 (1980).

elements of the government's defense which the court decided, were necessarily "intertwined" with the undetermined statutory predicates of that same defense. No constitutional judgment could properly be made without an interpretation of the relevant statutes. Pet. at 22-26.

B. The Government's Concession By Silence Warrants Summary Disposition In Favor Of Petitioners.

Rule 15.2 of this Court provides, in relevant part, as follows:

> ". . . [T]he brief in opposition should address any perceived misstatement of fact or law in the petition that bears on what issues would properly be before the Court if certiorari were granted. Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition."

This rule means that the brief in opposition is the time and place to identify any alleged misstatement in the petition and requires that the opposition brief should answer the arguments contained in the petition. R. Stern, E. Gressman, S. Shapiro, K. Geller, *Supreme Court Practice* (7th ed. 1993) § 6.37 at 373. The failure to make an argument in the opposition brief is significant, and the Court may treat the failure as a waiver. *Schiro v. Farley*, —— U.S. ——, 114 S. Ct. 783, 788-89 (1994); *Gardebring v. Jenkins*, 485 U.S. 415, 425 n.12 (1988). The fact that the Solicitor General does not oppose the granting of a petition for certiorari is entitled to respect. *Casey v. U.S.*, 343 U.S. 808, 811 n.4 (1952). And confession of error by a litigant is an important factor for the Court to take into account. *Id.* at 811. The Solicitor General's decision not to defend the propriety of deciding the property deprivation issues is significant and should be deemed a concession that the question presented by the petitioners merits certiorari and that the decision below was in error.

Rule 16.1 of this the Court provides for summary dispositions of certiorari petitions on the merits. When a lower court clearly lacks power to render a decision, the Court will summarily grant the writ, vacate the judgment, and remand to the Court of Appeals for entry of an appropriate order. *E.g., Iron Arrow Honor Society v. Heckler*, 464 U.S. 67, 73 (1983). Similarly, the Court will so act where the opinion below is clearly erroneous. *E.g., Burger v. Zant*, 467 U.S. 1212 (1983). In particular, summary dispositions may be made in response to a confession of error. *Cates v. Haderlein*, 342 U.S. 804 (1951); Stern, Gressman, et al., *Supreme Court Practice* § 5.12 at 248. Given the *de facto* confession of error by the Solicitor General here, the proper procedure would be to grant certiorari, vacate the judgment below, and remand the case to the Court of Appeals for further consideration in light of the failure of the Solicitor General to defend the improper adjudication, affirmed below, of some, but not all, elements of the defense.

Alternatively, the Court should at least request the Solicitor General to respond in a supplemental brief to the reasons set forth in the petition which were not addressed in the opposition brief. *Id.* § 6.37 at 375 (". . . [T]he Court may request a repsonse to the petition . . . and will defer action on the case until the views and arguments of the respondent have been made known."). Should the Court so request, petitioners respectfully request that they be given the right to reply to any new points raised in such supplemental brief.

II. NEW POINTS RAISED IN THE OPPOSITION BRIEF RELATING TO THE COURT'S ABSTENTION ON THE STATUTORY ELEMENTS OF THE DEFENSE ARE WITHOUT MERIT.

One reason for granting certiorari advanced in the petition was that the abstention on the statutory elements of the defense, in addition to amounting to an abuse of discretion, also amounted to a deprivation of property

without procedural due process. Pet. at 17-19. The government raises the new point that the procedural due process theory had not been argued in the Court of Appeals and, hence, "may not properly be raised here," citing *Delta Airlines, Inc. v. August*, 450 U.S. 346, 362 (1981). B.R.O. at 9. In *Delta Airlines*, the Court decided the proper interpretation of one federal rule relating to court costs, but declined to reach a claim under another rule on court costs, as the question had not been raised in the Court of Appeals.

In the instant case, petitioners argued below that the court should not have abstained on the statutory elements of the defense. They employed an abuse of discretion theory, rather than a procedural due process theory. Several Justices of this Court, however, have noted that an abuse of discretion by a District Court is tantamount to a violation of procedural due process. *Missouri v. Jenkins*, 495 U.S. 33, 66 (1990) (Kennedy, J. concurring); *Board of Regents v. Roth*, 408 U.S. 564, 590 (1972) (Marshall, J., dissenting); *Sacher v. U.S.*, 343 U.S. 1, 31 (1951) (Frankfurter, J., dissenting). Under appropriate circumstances, this Court may review questions not pressed or passed upon in the courts below. *Youakim v. Miller*, 425 U.S. 231, 234 (1976). Such review is appropriate where the claim, although not specifically articulated below, is necessary for a correct disposition of the other issues and the evidentiary record has been fully developed. *Taylor v. Illinois*, 484 U.S. 400, 406 n.9 (1988); *U.S. v. Mendenhall*, 446 U.S. 544, 551 n.5 (1980). Where the facts are undisputed and the issues have been raised and decided below, the Court may consider supplemental theories of law bearing on the same issues. See Stern, Gressman, et al., *Supreme Court Practice* § 6.26 at 344 n.92 (citing decisions of this Court for the proposition that purely legal questions presented in a petition may be appropriate for decision even though not addresed below). Here, the procedural due process theory is an appropriate adjunct to petitioners' argument, pressed

and passed on below, that the District Court's abstention was an abuse of discretion.

Also, the government makes a new point, unsupported by any evidence in the record and not asserted below, that abstention on the statutory interpretation issues was not erroneous, because such interpretation could not have been rendered "promptly" or with "dispatch" in the District Court.[2] B.R.O. at 9, 10. This contention is not correct. The meaning and effect of the relevant statutes could readily have been decided, based on the briefs, declarations, and other evidence presented by the parties, at any time on or after the initial May 3, 1993 hearing date. The statutory issues which the court declined to reach were no more complex nor difficult than the constitutional and contractual issues it reached and decided. Indeed, federal courts adjudicate statutory issues of comparable scope in similar proceedings every day, often from the bench.

The government also asserts the new point that petitioners' rebuttal to the statutory elements of the government's defense was "initially raised" in their April 23, 1993 reply papers and, as a result, the government "did not have an opportunity to address them." B.R.O. at 10-11. This, too, is inaccurate. When petitioners filed their post-judgment enforcement motion on March 26, 1993, they focused on their *prima facie* claim to enforce water rights. They had at that time neither the duty, nor the ability, to anticipate the precise nature of any affirmative defense the government might later raise. In its April 13, 1993 opposition papers the government asserted in conclusory fashion an affirmative defense founded on the first two of what would later become three statutory predicates. In reply, petitioners were finally able to, and

---

[2] The government cites *U.S. v. Montalvo-Murillo*, 495 U.S. 711, 716-22 (1990). B.R.O. at 10. That case is not factually apposite and, in fact, confirms that "a prompt hearing is necessary." *Id.* at 716.

did, present substantial factual evidence and legal argument demonstrating that these statutory elements of the government's defense had not been established. The initial oral argument on the government's defense took place on May 3, 1993 and the District Court published its first decision on June 18, 1993. At no time between April 23 and June 18 did the government complain that it had been denied an opportunity to present its defense, nor could it have so complained. In its July 23, 1993 opposition to petitioners' second motion, the government tardily asserted in conclusory fashion a statutory argument supposedly supporting the third involuntary reallocation. It offered at that time no further evidence, and little further argument, on the previously briefed statutory issues.

CONCLUSION

For these reasons, the Court should summarily dispose of this case by granting certiorari, holding that the District Court rendered a premature and unnecessary decision, vacating the opinion of the Court of Appeals, and remanding the case to that court for further proceedings not inconsistent with this Court's judgment. At the very least, this Court should ask the government to deal with petitioners' argument.

Respectfully submitted,

Of Counsel:

HAL S. SCOTT
Harvard Law School
1557 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4590

Dated: November 17, 1995

WILLIAM M. SMILAND
Counsel of Record
SMILAND & KHACHIGIAN
Seventh Floor
601 West Fifth Street
Los Angeles, CA 90071
(213) 891-1010
Attorneys for Petitioners